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No. 90-918

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CHRISTINE FRANKLIN,

Petitioner,

v.

GWINNETT COUNTY PUBLIC SCHOOLS,
a LOCAL EDUCATION AGENCY (LEA);
DR. WILLIAM PRESCOTT, an Individual,

Respondents.

Brief In Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED FOR REVIEW

Rule 24.2 of the Rules of the Supreme Court provides that a brief by a respondent need not set forth the "Questions Presented for Review" unless Respondent is dissatisfied with the presentation by the Petitioner. Respondents believe that the Petitioner's issues are unnecessarily conditional and complicated. Respondents contend that the only real question presented for review is:

I.

Whether Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq. allows compensatory damages to an individual for a violation of Title IX, in addition to the remedies plainly provided by Title IX.

PARTIES

Respondents agree with the deliniation of the parties as provided by the Petitioner in her brief, except that the correct title for the governmental entity is the Gwinnett County School District, which has been incorrectly sued in this action as "Gwinnett County Public Schools."

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OPINIONS BELOW

Petitioner has correctly recited the opinion of the United States Court of Appeals for the Eleventh Circuit as Franklin v. Gwinnett County Public Schools, et al., 911 F.2d 617 (11th Cir. 1990), and has provided the unreported opinion of the Honorable Orinda D. Evans, Judge, United States District Court for the Northern District of Georgia as Appendix B to Petitioner's Brief.

JURISDICTION

Respondents agree with Petitioner's statement of jurisdiction.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Respondents are dissatisfied with Petitioner's statement of the Constitutional and statutory provisions involved in this appeal. It is clear that Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, et seq. is the focus of this appeal, as Petitioner urges this Court to expand the remedies allowed under Title IX to include compensatory damages.

Petitioner contends that § 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, et seq. is also applicable. Respondents agree that, to the extent that Title VI served as the legislative antecedent for Title IX, an analysis of Title VI cases may be helpful in interpreting Title IX.

Respondents do not agree that the Fourteenth Amendment is directly involved in an analysis of this case, nor do Respondents agree that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et seq. pertaining to employment situations, is applicable to the case at bar.

STATEMENT OF THE CASE

This case is one of three legal actions initiated by Petitioner, a former high school student, now graduated, against the Gwinnett County School District, (incorrectly sued as Gwinnett County Public Schools), Dr. William

Prescott, (hereinafter "Gwinnett County," "Respondent School District," "Dr. Prescott," and "Respondents"), and the individual teacher, seeking compensatory and punitive damages. The case at bar was a federal court action brought under Title IX because of alleged sexual discrimination. Petitioner claims that she suffered this discrimination as a result of alleged advances made upon her by an individual high school faculty member. Respondents moved to dismiss Petitioner's United States District Court action for failure to state a claim under F.R.C.P. 12(b (6), on the grounds that Petitioner's Title IX claim was moot. Gwinnett County had been found to be in compliance with the requirements of Title IX by the Office for Civil Rights, as Petitioner herself established by amending her complaint to include as an exhibit the findings of the Office for Civil Rights. Both individuals against whom Petitioner made claims, the individual faculty member and Dr. Prescott, were no longer present at the school at the time Petitioner filed her case. Furthermore, Title IX does not provide for an action against an individual such as Dr. Prescott, and for that reason, as well as the mootness of Petitioner's claim, the Respondents urged that the Petitioner's complaint should be dismissed.

Petitioner responded to this motion at the trial level by basically conceding that the only issue left for determination by the district court was that of whether compensatory damages were recoverable under Title IX. The district court below granted Respondents' Motion to Dismiss, and

Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit considered all of Petitioner's arguments urging that the remedies provided by Title IX should include compensatory damages to an individual such as Petitioner. However, the Eleventh Circuit affirmed the decision of the district court, holding that the desired expansion of remedies under Title IX did not seem to be authorized by any authorities presented by Petitioner. The dispute now moves to the United States Supreme Court on Petitioner's Application for Writ of Certiorari.

FACTS OF THE CASE

As this matter is on appeal from a motion to dismiss pursuant to F.R.C.P. 12(b)(6), Respondents herein are required to operate as if the facts, alleged by Petitioner below in her complaints, are true. Respondents contended successfully, both at the trial court and before the Eleventh Circuit, that Petitioner simply had no cause of action under Title IX as alleged in her complaint, regardless of the underlying facts. However, Respondents wish to advise this Court that Petitioner's Application for Writ of Certiorari contains a statement of facts which is significantly expanded from that which is actually contained in the record below. Respondents consider Petitioner's expansion of facts as an attempt to sensationalize what is plainly a legal issue, and one that is virtually distinct from the underlying facts.

Respondents submit that the origin of Petitioner's expanded facts is her state court action against the allegedly offensive faculty member, Franklin v. Hill, Civil Action File No. 88A-3696-5, pending in the Superior Court of Gwinnett County, Georgia, before the Honorable Richard T. Winegarden, and in which Petitioner has conducted numerous depositions. Additionally, Petitioner instituted a state court action against the Gwinnett County School District, as well as the individual principal and guidance counselor of her former high school, alleging the same violations of Title IX as contained in the instant case, as well as counts based on state law and 42 U.S.C. § 1983. Franklin v. Gwinnett County Public School, Dr. Franklin Lewis and Virginia Lacy, currently before the Georgia Court of Appeals, Docket No. A91A0113, on appeal from a dismissal by the trial court on grounds of res judicata.

In essence, the facts as they are alleged below involve a female high school student who claims that she was sexually harassed by an individual faculty member from whom she had taken one economics class the year before. Petitioner claims that she engaged in sexual intercourse with this faculty member on three occasions, each time willingly, though she does claim that she was intimidated and coerced into these acts of sexual intercourse. There is no allegation that Petitioner traded sex for academic advancement. There is no allegation that this individual faculty member had any position of authority with the Respondent School District beyond that of a mere teacher. There is no allegation that the

Respondents had any direct knowledge of the alleged sexual relationship until Petitioner herself communicated her claim to a female faculty member, who immediately notified the school guidance counselor, who in turn initiated a prompt and complete investigation.

Petitioner does allege that the high school administrators knew or should have known of certain sexually harassing conduct by the alleged offending faculty member, but the basis of the "knowledge" consists of vague comments made by other students, not Petitioner, and none of the comments specifically identified a sexual relationship between Petitioner and the faculty member. Although Petitioner makes the bald allegation that she has been intentionally discriminated against by Respondents herein, her factual allegations do not support this conclusion of intentional discrimination. The allegations against Dr. Prescott are against him individually, not as any school authority. He served only as band director and music teacher; there is no allegation that he was, or acted as, a member of the school administration.

Petitioner instituted an investigation by the Office for Civil Rights, which concluded that while technical violations of Title IX had occurred, the Gwinnett County School District was in compliance with the mandates of Title IX. This is set forth in the OCR report attached to Petitioner's amended complaint. In the case at bar, Petitioner alleged no violation of 42 U.S.C. § 1983 nor of any federal statute other than Title

IX. As the trial court found Petitioner's federal claim to be moot, her case was dismissed.

SUMMARY OF ARGUMENT

Title IX does not authorize compensatory damages to an individual. The expansion of Title IX remedies to include compensatory damages is not authorized by the statute itself, nor by the legislative history of Title IX. The remedies provided by Title IX include injunctive relief and the withdrawal of federal funding. These remedies are appropriate, as Title IX is a part of federal funding legislation. The remedy sought by Petitioner ironically could potentially do more harm than good to an institution in a purported effort to cure a violation. Petitioner would divert the very federal funding that she alleges was improperly utilized by an educational institution and channel it instead into Petitioner's own pocket as compensatory damages. In addition, Petitioner's desired remedy would have the effect of subjecting any given educational institution to potentially unlimited liability for monetary damages when the contractual nature of Title IX only provides limited federal funding to begin with.

The case law relied upon by Petitioner in support of her position does not authorize compensatory damages to an individual for alleged intentional discrimination. Petitioner draws her conclusion from the holding of the case that unintentional discrimination does not merit compensatory damages. Petitioner reads too much into this particular

Supreme Court decision, Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed. 2d 866 (1983).

A recent decision from the Third Circuit, Pfeiffer v. Marion Center Area School District, et al., 917 F.2d 779 (3rd Cir. 1990) does not represent an actual split from decisions previously rendered in both the Seventh and Eleventh Circuits, as Petitioner would contend. The Pfeiffer opinion is factually distinguishable from the case at bar, and what is more, the Pfeiffer court's reasoning is incomplete, as no provision is made for the origin of the compensatory damages, assuming Ms. Pfeiffer can even show any. Therefore, the perceived split of authority between the circuits is not mature for consideration by the Supreme Court.

Even assuming for the sake of argument that Petitioner's interpretation of her chosen authorities is correct, such that the law authorizes compensatory damages for intentional discrimination in violation of Title IX, the facts of the instant case do not constitute intentional discrimination. The clear holding of Petitioner's chief supporting case, Guardians, supra, does not authorize Petitioner's desired remedy in cases of unintentional discrimination. The facts of the case at bar can only be shown to interpret unintentional discrimination, if any, by Respondents herein.

Title IX does not authorize actions against an individual, such as Respondent Dr. Prescott. Petitioner has essentially abandoned her claim against Dr. Prescott, though he is still noted by Petitioner as a Party to this action.

In conclusion, the decisions of both the trial court below and the Eleventh Circuit Court of Appeals were correct, and should not be disturbed. Ms. Franklin's Petition for Writ of Certiorari should be DENIED.

RESPONDENTS' ARGUMENTS AGAINST GRANTING THE PETITION

I. TITLE IX DOES NOT AUTHORIZE COMPENSATORY DAMAGES TO AN INDIVIDUAL SUCH AS PETITIONER

A. Background Of Title IX.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., (hereinafter "Title IX") was enacted by Congress pursuant to its powers under the Spending Clause of the United States Constitution. Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, at 599, 103 S.Ct. 3221, at 3231, 77 L.Ed. 2d 866 (1983) (hereinafter referred to as "Guardians" throughout this brief). Basically, Title IX provides that federal funding will be provided to educational institutions for use in furthering the education of students without regard to their sex. The arrangement is considered quasi-contractual in nature; the receiving institution agrees not to discriminate on the basis of sex in exchange for the provision of limited funding by the

federal government. Guardians, supra, 463 U.S. at 596, 103 S.Ct. at 3229.

B. The Supreme Court Has Sanctioned A Private Right Of Action Under Title IX But Not Individual Compensatory Damages

An individual, such as Petitioner herein, was only granted the right to bring a private action to enforce Title IX in 1979. Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed. 2d 560 (1979). In that action, it was reasoned that the intended beneficiaries of Title IX funding would benefit from the correction of a violation, regardless of the status of the entity calling attention to the alleged violation. However, it is important to note that when the United States Supreme Court sanctioned a private right of action to enforce Title IX, no expansion of remedies under Title IX was similarly sanctioned.

Title IX provides remedies for its violation by an educational institution. The primary remedy is injunctive relief; the institution is enjoined from engaging in any offending or discriminatory conduct. If the injunctive remedy is not sufficient, then the next step is the withdrawal of federal funding from the non-complying institution. Guardians, supra, 463 U.S. at 598, 103 S.Ct. at 3230.

Petitioner would have these traditional Title IX remedies expanded to include compensatory damages to an individual alleging discrimination in violation of Title IX. Respondents counter by urging that the remedies provided

by Congress within the framework of Title IX are sufficient for the purposes of Title IX and that no expansion of these remedies is needed, nor desirable, in this setting. Money provided under Title IX is not geared to the individual but rather to all students of an institution, and it is required to be utilized for the benefit of all students without regard to gender. The expanded remedy sought by Petitioner herein would drain off monies meant for all students, and deposit that money in the pocket of an individual student. This result would be at odds with the original intent underlying Title IX.

C. The Legislative History of Title VI Confirms That Compensatory Damages Were Never Intended As A Remedy For Non-Compliance

The intent of Congress in passing the sex discrimination provision of Title IX must be traced to the purpose behind the passage of Title VI in 1964. In a summary of the 1972 Amendments, prepared by the Association of American Colleges and offered for print in the Congressional Record by Indiana Senator Birch Bayh on July 20, 1972, it is stipulated that the enforcement provisions of Title IX are identical to, and are patterned after, those of Title VI. As Title VI was the pioneer legislation to curb discrimination in an educational setting, it is naturally the source of the most informative Congressional dialogue concerning the enforcement of anti-discriminatory measures.

The record of the Senate debate that took place prior to the passage of Title VI is conspicuously devoid of any discussion, pro or con, regarding possible compensatory relief to a victim of discrimination at the hands of a recipient of federal funds. To the contrary, proponents of the Civil Rights legislation took pains to dissuade colleagues of the notion that Title VI was a vehicle for punishing an offender. Senator Hubert Humphrey of Minnesota said that "nothing was further from the truth" than the statement that Title VI was punitive or vindictive. 110 Cong. Rec., 6544 (1964). The purpose of Title VI, Senator Humphrey went on to say, was to insure that funds provided by the American people would not be used to support discrimination. Id., at 6544.

As a means to the end of putting a stop to discrimination, the only measure ever discussed -- and itself greatly debated -- was the cessation of funds to violators who refused to comply with federal requirements. Senator Humphrey called this "a last resort." Id. at 6544. The Legislative History of the Civil Rights Act states that this penalty would be used to enforce the only sanction offered by the bill - that of injunctive relief. Act of July 2, 1964, Publ. L. No. 88-352, 1964 V.S. Code Cong. and Admin. News, (78 STAT. 241).

Respondents contend that had the Congress intended to allow compensatory damages in a Title IX action, such would have been included in the legislation. The summary of the 1972 Amendments stipulated that the enforcement provisions

of Title IX were patterned after those of Title VI. The Congressional Record on both Title IX and the prior discussion on Title VI contains nothing on the issue. The only conclusion to be drawn is that compensatory relief was never meant to be a part of Title VI or Title IX. The Congressional Record reveals that an intense battle took place on the Senate floor over what measures could be used to enforce the anti-discrimination laws. If money damages had ever been seriously contemplated, it seems that the subject of such relief to a victim would have surfaced in those debates. The absence of such a discussion should, in itself, prohibit the practice of "creating" intent that was not present during Congressional debate. The expanded remedy sought by Petitioner herein is unauthorized, and should not be extended.

D. The Remedy Sought By Petitioner Is Unfair.

Respondents urge that the expansion of Title IX remedies to include compensatory damages to an individual is unfair for three reasons. First of all, as is noted above, this remedy diverts monies to an individual student when those monies are properly intended for the benefit of all students at an institution. Secondly, Petitioner's desired remedy assumes that the existing remedies provided by Title IX are insufficient. Congress did not specify compensatory damages to an individual but, rather, the remedies of injunctive relief and withholding of federal funding, as discussed above. These remedies have been satisfactory for over twenty-five years.

Thirdly, and perhaps most importantly, the remedy sought by Petitioner would subject the institution receiving funding under Title IX to potentially unlimited liability for a Title IX violation when the contractual nature of the arrangement with the federal government provides only limited funding to the institution to begin with. At a minimum, educational instiutions should not be burdened with this added liability without first having an opportunity to decline Title IX funding, and with it Title IX liability. Accordingly, the remedy sought by Petitioner herein seems unfair, unjustified, and in violation of the policy considerations underlying Title IX. Certiorari should be denied.

II. THE GUARDIANS DECISION DOES NOT SUPPORT PETITIONER'S POSITION BEFORE THIS COURT THAT A CASE ALLEGING INTENTIONAL DISCRIMINATION AUTOMATICALLY QUALIFIES FOR COMPENSATORY RELIEF.

Petitioner relies heavily on the U.S. Supreme Court case of Guardians Association v. Civil Service Commission of the City of New York, 463 U.S. 582, 103 S.Ct. 3221, 77 L.Ed. 2d 866 (1983). The Guardians case was brought seeking relief under Title VI and Title VII. The fact that Petitioner can find no Title IX case to support her position, other than the recent Third Circuit decision of Pfeiffer v. Marion Center Area School District, et al., 917 F.2d 779 (3rd Cir. 1990) (hereinafter "Pfeiffer"), is in itself a comment on the precariousness of her position. Petitioner attempts to link

her Title IX analysis with the interpretation of Title VI in the Guardians decision, since both Titles emanate from Spending Clause legislation. Ironically, Petitioner later attempts to minimize the linkage of Title IX to Spending Clause legislation in her attempt to seek support from the Fourteenth Amendment.

Petitioner correctly asserts that Mr. Justice White, in his majority opinion in Guardians, concluded that compensatory relief is not available as a private remedy for Title VI violations not involving intentional discrimination. However, Petitioner falls into error in her position that Guardians stands for any mandate by the U.S. Supreme Court that compensatory relief is available to private individuals in cases of intentional discrimination. While the negative pregnant is clearly implied in Mr. Justice White's opinion, the Guardians decision never actually authorizes the compensatory relief sought by Petitioner herein, nor does Title IX's legislative history.

Respondents contend that perhaps Mr. Justice White was not certain himself on the issue of compensatory relief. Mr. Justice White wrote that "... it may be that the victim of intentional discrimination should be entitled to a compensatory award ..." (emphasis added) Guardians, supra 463 U.S. 582, at 598, 103 S.Ct. 3221, at 3230. Mr. Justice White himself was apparently not so confident that a private individual is clearly entitled to compensatory relief under the proper circumstances in a Spending Clause case. The Guardians decision is now almost eight years old, and only

the recent Pfeiffer decision from the Third Circuit is able to thread together the splintered majority decision in Guardians to support a finding of compensatory damages to an individual. At the same time, the Pfeiffer court expressed considerable doubt that Ms. Pfeiffer could prove any damages given the facts of her case. Pfeiffer makes no provision for the source of any compensatory damages if any are awarded to plaintiff. Furthermore, Pfeiffer is factually distinguishable from the case at bar, as will be discussed below at pp. 20-25 of this Brief.

The Guardians case was decided by a bare majority, and a fractured majority at that: four justices dissented from the majority opinion, and two justices out of the majority filed opinions concurring in the judgment but disagreeing with the holding. Mr. Justice Powell and Mr. Chief Justice Burger did not agree that private actions should be authorized, but did vote to affirm the Court of Appeals decision below. Private action to enforce Title IX was authorized by Cannon v. University of Chicago, supra, 441 U.S. 677 (1979) but the remedy of compensatory damages was not created. "Whether a litigant has a cause of action 'is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.'" Guardians, 463 U.S. at 595, Mr. Justice White quoting from Davis v. Passman, 442 U.S. 228, 239, 99 S.Ct. 2264, 2274, 60 L.Ed. 2d 846 (1979).

In Guardians, Mr. Justice White clearly urged caution in the area of expanded remedies. He stated "[s]ince the

private cause of action ... is one implied by the judiciary rather than expressly created by Congress, we should respect the ... considerations applicable in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder." Guardians, 463 U.S. at 597, 103 S.Ct. at 3230.

Respondents here agree with the interpretation of Guardians provided by the Eleventh Circuit in its opinion in this case below:

> Although it seems clear that the judgment of Guardians Association precludes a cause of action for compensatory damages for unintentional discrimination, we believe the various opinions of a majority of the justices simply leaves open the question whether compensatory damages for intentional discrimination may be sought. We do not read Guardians Association to hold that because no damages may be sought for unintentional discrimination, this necessarily leads to the inevitable conclusion that where intentional discrimination is shown, a damages remedy is possible. The question is simply open, and thus the inferior courts are free, checked only by the constraints within their respective spheres of authority, to act as they deem appropriate. Franklin, 911 F.2d 617, at 625 (11th Cir. 1990) (emphasis supplied by the Court).

An issue that is "open" does not mandate an expansion of the remedies provided within the body of Title IX. Guardians does not authorize compensatory damages to an individual seeking relief under Title VI, nor by extension Title IX. Ms. Franklin's Petition for Writ of Certiorari should be denied.

III. THE PERCEIVED SPLIT OF AUTHORITY BETWEEN THE CIRCUITS IS NOT MATURE FOR CONSIDERATION BY THE U.S. SUPREME COURT

Petitioner contends that there is a split of authority between the circuits due to the recent Third Circuit decision in the case of Pfeiffer v. Marion Center Area School District, Board of School Directors for the Marion Area, et al., 917 F.2d 779 (3rd Cir. 1990). In fact, the Pfeiffer case stands in stark contrast to other decisions concerning Title IX, as the Pfeiffer opinion admits in its body. In essence, the Third Circuit in Pfeiffer has assumed a minority position in its interpretation of Guardians. The Pfeiffer court admits that the Guardians decision is fragmented and that the court reached its decision "not without some difficulty."

The Pfeiffer court went on in its decision to admit that its opinion was at odds with those from the Eleventh Circuit and the Seventh Circuit concerning Title IX. The Seventh Circuit has long declined to recognize any litigant's attempt to allow compensatory damages for an action under Title IX. Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (on certiorari from the Seventh Circuit); Cannon v. University of Chicago, 710 F.2d 351 (7th Cir. 1983); Accord, Lieberman v. University of Chicago, 660 F.2d 1185 (7th Cir. 1981), cert. den'd 463 U.S. 602, 102 S.Ct. 1993, 72 L.Ed. 2d 456 (1982). The Fifth and Eleventh Circuits have also declined to recognize compensatory damages as a remedy owed to an individual for violations of

Title VI or Title IX. Drayden v. Needville Independent School District, 642 F.2d 129 (5th Cir. 1981), adopted as precedent upon the creation of the Eleventh Circuit by its declaration in the case of Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981); Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990).

In fact, the Pfeiffer court would appear to be at odds with the reasoning of the U.S. Supreme Court in its consideration of the case of Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed. 2d 694 (1981). Title IX, like Title VI, is considered part of the legislation enacted by Congress pursuant to the Spending Clause. Guardians, supra, 463 U.S. at 598, 103 S.Ct. at 3230 (opinion of White, J.). In such a case, the U.S. Supreme Court has not required a defendant to "provide money to plaintiffs, much less require [a defendant] to take on ... open ended and potentially burdensome obligations ..." Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, at 29, 101 S.Ct. 1531, at 1546, 67 L.Ed. 2d 694 (1981).

The Pfeiffer court's analysis fails to take up the important issue of just where compensatory damages for this plaintiff would originate. In fact, a superficial reading of the Pfeiffer decision indicates that the Third Circuit has considerable doubt that Ms. Pfeiffer will be able to prove any compensatory damages, even though the Third Circuit has determined that she is entitled to same in this Title IX setting. The impact of the Third Circuit decision in Pfeiffer is unclear,

and for that reason, Respondents submit that there may in fact be no split of authority between the circuits at this point in time. It may well be premature for the Supreme Court to take up this issue, particularly within the context of a factually distinguishable case from a circuit other than the Third. In all honesty, Respondents herein would prefer not to be forced to bear the expense of litigation before the Supreme Court in order to correct a novel ruling from a foreign circuit.

The Pfeiffer decision is also clearly distinguishable from the case at bar on the basis of the facts alone. Plaintiff Arlene Pfeiffer was dismissed from her high school chapter of the National Honor Society because of premarital sexual activity, considered by her chapter to be inconsistent with the standards of leadership, character and moral conduct required for membership. There can be no question that the action taken against Ms. Pfeiffer was intentional. The faculty council of her high school chapter held a meeting and invited her to attend. Ms. Pfeiffer was questioned as to whether her pregnancy had been voluntary, and she replied in the affirmative. Within five days' time, she had been dismissed from the Society. If these actions by her chapter constituted discrimination, and the court clearly concluded that they did, there can be no question but that this discrimination was intentional. Ms. Pfeiffer was singled out by name and individually dismissed.

In contrast, the facts of the case at bar do not indicate that Respondents herein made any act or omission as

pertaining to Petitioner Christine Franklin until such time as she herself reported to a faculty member that she had been coerced into having sexual relations with a male teacher. The facts of Petitioner's case below clearly indicate that no member of the Respondent School District had knowledge of this impermissible activity until Ms. Franklin herself made the disclosure. At that point in time, a prompt investigation was undertaken. The violations of Title IX delineated by the Office for Civil Rights in its investigation of Petitioner's case were of a general nature; the Respondent School District was found not to have in place a procedure whereby complaints for Title IX could be made and processed. This "discrimination" could hardly be characterized as intentional as to Petitioner Christine Franklin. The violation of Title IX as perceived by OCR was a technical one, and clearly impacted all students at the school, not just Petitioner. Furthermore, as the OCR Report indicates, the School District came into compliance with Title IX prior to Petitioner's initiation of her federal court action.

As the Pfeiffer case is clearly distinguishable on its facts from the case at bar, the interpretation of Title IX contained in Pfeiffer is similarly distinguishable from the case. The Pfeiffer decision does not represent a split of authority between the circuits so as to merit a grant of certiorari here.

IV. THE FACTS OF THIS CASE DEMONSTRATE THAT THERE HAS BEEN NO INTENTIONAL DISCRIMINATION BY RESPONDENTS

Respondents have contended throughout this brief that the decision of the U.S. Supreme Court in Guardians Association v. Civil Service Commission, et al., supra, 463 U.S. 582 (1983) does not authorize the expansion of compensatory damages to an individual such as Petitioner herein. Respondents do not agree with Petitioner's interpretation of the Guardians decision. However, assuming arguendo that the Guardians decision does authorize compensatory damages to an individual in a case of intentional discrimination, Respondents respectfully show this Court that the facts of the case at bar do not constitute intentional discrimination, such that this case would not qualify for the Petitioner's interpretation of the Guardians decision. Accordingly, Petitioner's Application for Writ of Certiorari should be denied.

The facts of this case, when reduced to their essence, involve a female high school student who alleges that she was sexually harassed by an individual faculty member from whom she had taken one economics class the year before. Petitioner contends that she engaged in sexual intercourse with this faculty member on three occasions, each time willingly, although she does allege that she was somewhat intimidated and coerced into the separate acts of sexual intercourse. There is no allegation that this faculty member had any position of authority with the Respondent School

District beyond that of a mere teacher. More importantly, there is no allegation that the Respondents had any direct knowledge of the alleged sexual relationship between Petitioner and this teacher until Petitioner herself communicated her story to one of her female teachers. This female teacher immediately notified the school guidance counselor, who in turn set in motion a prompt and complete investigation of the allegations made by Petitioner.

Petitioner does allege that the high school administrators knew or should have known of certain sexually harassing conduct by the offending male teacher, but the basis of this "knowledge" consists of vague comments made by other students, not Petitioner herein, and none of the comments from other students specifically identified any sexual relationship between the male teacher and Petitioner. Simply put, there is no factual allegation of any act or omission on the part of Respondents herein which could be even arguably identified as intentional discrimination against Petitioner.

Respondent's violation of Title IX consisted essentially of a failure to have in place a procedure whereby students could report alleged violations of Title IX. This "failing" impacted male and female students alike, so no intentional discrimination can be alleged by Petitioner against Respondents herein. Only the individual teacher could be said to have intentionally acted toward Petitioner, and Mr. Hill is not a party to the case at bar. There is no suggestion, much less any allegation, that the individual teacher acted

within the scope of his teaching duties when he allegedly had sex with Petitioner. Similarly, there is no allegation that Respondents knew of any sexual relationship whatsoever between the teacher and Petitioner until the Petitioner divulged the information to another faculty member. Once the Respondent School District knew of the allegations, a prompt and thorough investigation took place. Petitioner was treated no differently by Respondent than would any other student, male or female. Certiorari should be denied.

V. TITLE IX DOES NOT AUTHORIZE ACTIONS AGAINST AN INDIVIDUAL SUCH AS DR. PRESCOTT.

Petitioner filed suit against Dr. William Prescott as an individual in the district court below, claiming that Dr. Prescott violated Title IX in his dealings with Petitioner. Dr. Prescott is identified as a party to this action by Petitioner in her Application for Writ of Certiorari, but she does not include any of her arguments to the trial court below in her Brief to this Court. Respondents contend that this is an acknowledgement by Petitioner that she has no valid cause of action under Title IX as to Dr. Prescott.

Title IX does not authorize a right of action against an individual employee of an educational institution. Leake v. University of Cincinnati, 605 F.2d 255, 259 (5) (6th Cir. 1979); Accord, Romeo Community Schools v. H.E.W., et al., 600 F.2d 581 (6th Cir. 1979). The district court was correct in

dismissing the Petitioner's case against Dr. Prescott. Petitioner essentially conceded this fact in that she declined to discuss this issue in her appellate brief to the Eleventh Circuit. The Eleventh Circuit considered this particular issue to have been abandoned by Petitioner. Franklin v. Gwinnett County Schools, et al., 911 F.2d 617, at 628 (11th Cir. 1990). Petitioner's Application for Certiorari should be denied as to this issue as well.

VI. CONCLUSION

Ms. Franklin's Petition for Writ of Certiorari should be DENIED. Title IX does not countenance the remedy of compensatory damages to an individual, and Petitioner's arguments are unpersuasive that an expansion of remedies should be created here. The Third Circuit decision which is apparently at odds with the opinion of the Eleventh Circuit in this case, is not mature at this time for consideration by the Supreme Court as a split among the Circuits. The Third Circuit decision is also factually distinguishable from the case at bar, as Petitioner cannot demonstrate the intentional discrimination that her argument requires. The opinion of the Eleventh Circuit in this case should not be disturbed.

Respectfully submitted, this 11th day of January, 1991.

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All above counsel have been duly admitted to the Supreme Court for the State of Georgia, the highest Court of Record in this state.